In the Supreme Court

Appeal from the Court of Appeals

ANGLERS OF THE AUSABLE, INC., a Michigan nonprofit corporation; MAYER FAMILY INVESTMENTS, LLC, a Michigan limited liability company; and NANCY A. FORCIER TRUST,

Plaintiffs-Appellants,

Docket Nos. 138863-138866

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, a department in the Michigan Executive Branch, and STEVEN E. CHESTER, Director of the Michigan Department of Environmental Quality; and MERIT ENERGY COMPANY, a Delaware Corporation,

Defendants-Appellees.

Amicus Curiae Brief of Michigan Environmental Council

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Statement of the Basis of Jurisdiction

Amicus curiae Michigan Environmental Council concurs in appellants' statement of jurisdiction (brief p ix).

Statement of Questions Involved

1. Should this Court overrule *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479 Mich 280; 737 NW2d 447 (2007), and hold that the Michigan Environmental Protection Act, MCL 324.1701 *et seq.*, grants universal standing?

Appellants answer "Yes".

Appellee Department of Environmental Quality answers that the question has already been decided.

Appellee Merit Energy Company answers that the question has already been decided.

Amicus curiae Michigan Environmental Council answers "Yes".

2. Should this Court overrule *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004), and hold that plaintiffs in an action pursuant to the Michigan Environmental Protection Act, MCL 324.1701 *et seq.*, can challenge administrative permits without challenging the conduct of permittees.

Appellants answer "Yes".

Appellee Department of Environmental Quality answers "No".

Appellee Merit Energy Company answers "No".

Amicus curiae Michigan Environmental Council answers "Yes".

Statement of Facts

Amicus curiae Michigan Environmental Council concurs in appellants' statement of facts (brief pp 3-8).

Argument

This amicus brief responds to this Court's invitation in granting leave in this case, 485 Mich 1067; 777 NW2d 407 (2010), to consider whether plaintiffs have a cause of action under the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq.*,[1] against defendant Department of Environmental Quality (DEQ) (now Department of Natural Resources and Environment) and whether this Court correctly decided *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479 Mich 280; 737 NW2d 447 (2007), and *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004). The issues are (1) whether MEPA grants universal standing to sue, and (2) whether a plaintiff states a claim under MEPA by challenging a permit issued by an administrative agency. Amicus curiae Michigan Environmental Council submits that both questions should be answered in the affirmative, based upon the language, structure, purpose and history of MEPA and based upon this Court's precedents.[2]

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[1]MEPA is discussed generally in Chapter 14 of the Michigan Environmental Law Deskbook (2d ed), available at www.envdeskbook.org (through the State Bar of Michigan), starting September 30, 2010.

[2] Amicus Michigan Environmental Council concurs with the arguments in sections I, II and III of appellants' brief concerning the proper tests under Michigan water law and the law of riparian easements.

I. MEPA grants universal standing to sue.

A. Standard of review.

Whether MEPA grants standing to sue presents an issue of statutory interpretation that this Court reviews de novo. *Preserve the Dunes*, 471 Mich at 513, citing *Oade v Jackson Nat'l Life Ins Co,* 465 Mich 244, 250; 632 NW2d 126 (2001). In *Potter v McLeary,* 484 Mich 397, 410-411; 774 NW2d 1 (2009), this Court more fully explained the method of statutory interpretation:

> Assuming that the Legislature has acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature.[12] In determining the intent of the Legislature, this Court must first look to the language of the statute.[13] The Court must, first and foremost, interpret the language of a statute in a manner that is consistent with the intent of the Legislature.[14] "'As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.'"[15] Moreover, when considering the correct interpretation, the statute must be read as a whole.[16] Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[17] In defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme.[18] A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained.[19] Finally, the statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme.[20]

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[12]*Sun Valley Foods Co v Ward*, 460 Mich 230 236; 596 NW2d 119 (1999).
[13]*Id.*
[14]*Id.* at 135.
[15]*Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570, 579 (2008) quoting *Sun Valley*, *supra* at 237.

[16] *Sun Valley*, *supra* at 237.
[17] *Herman, supra* at 366.
[18] *Id.*, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501, 133 L Ed 2d 472 (1995).
[19] *Wayne Co v Auditor General*, 250 Mich 227, 223; 229 NW 911 (1930).
[20] *Wayne Co, supra* at 234.

B. The text of MEPA grants universal standing to sue.

The Legislature, in enacting MEPA, unambiguously granted standing to any person to bring an action to protect the air, water, or other natural resources from pollution, impairment or destruction:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

MCL 324.1701(1). MEPA is Part 17 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. The definitions section of NREPA defines "person" as "an individual, partnership, corporation, association, governmental entity, or other legal entity." MCL 324.301(h). The Legislature incorporated this broad definition of "person" in MEPA to authorize citizens and all legal entities to bring actions to protect the environment. The Legislature granted standing to citizens as equals of the attorney general, so that citizens act as private attorneys general.[3] The purpose of the Legislature's creation of private attorneys general is not to supplant executive power, but

[3] The modern concept of private attorneys general was first advanced in *Scenic Hudson Preservation Conference v Federal Power Comm'n*, 354 F2d 608, 619-620 (CA2, 1965) ("A party acting as a 'private attorney general' can raise issues that are not personal to it.").

to supplement executive power to protect the environment. The Legislature enacted MEPA to be "supplementary to existing administrative and regulatory procedures provided by law." MCL 324.1706. As this Court has recognized, "[n]ot every agency proved to be diligent and dedicated defenders of the environment" even though MEPA is an invaluable weapon for those agencies "committed to protecting our environment." *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 305 & n7; 224 NW2d 883 (1975).

C. The effect of this Court's overruling *Michigan Citizens* in *Lansing Schools.*

In *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich ____; ___ NW2d ___ (2010) (Docket No. 138401, issued July 31, 2010, slip opinion at 21 n18), this Court overruled *Michigan Citizens*. This Court thus answered one of the questions posed in its grant of leave in this case. Nevertheless, it is important to explore the effect of this overruling.

The effect of overruling a case is to declare that the rule of law announced in that case no longer has precedential value. *Sumner v General Motors Corp* (*on remand*), 245 Mich App 653, 665; 633 NW2d 1 (2001). *Michigan Citizens* followed the standing doctrine announced in *Lee v Macomb Cty Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), and followed in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 475 Mich 608; 684 NW2d 800 (2004), that the Legislature cannot confer standing on persons who do not suffer an injury in fact causally related to defendant's conduct that can be redressed by a court because the Legislature, in doing so, would violate the separation of

powers doctrine. *Michigan Citizens*, 479 Mich at 302-303. As overruled, the *Lee-Cleveland Cliffs-Michigan Citizens* standing rule now has no precedential value.

This Court in *Lansing Schools* reinstated the prudential doctrine of standing. This Court noted that historically in Michigan, legislative creation of standing is a sufficient condition to confer standing on a plaintiff. As an example of such legislatively-conferred standing, this Court cited MEPA, as construed in *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 45; 576 NW2d 641 (1998) (Cavanagh, J. dissenting), discussing MEPA's citizen standing provision as historically important and valid. *Lansing Schools*, slip opinion at 6 & n4. In overruling *Lee*, *Cleveland Cliffs* and *Michigan Citizens*, this Court reaffirmed the validity of statutory standing:

> If the Legislature unambiguously expresses an intent to confer standing through a statute's text, then it would certainly sufficient to confer standing.

Lansing Schools, slip opinion at 24 n23. This rule applies with full force to MEPA. As demonstrated in Section I.B above (pages 4-5), the Legislature unambiguously conferred standing in MEPA on "any person". Pursuant to the rule announced in *Lansing Schools*, this Court should affirm that MEPA grants universal standing to sue.

D. The scope of standing under MEPA.

This Court, in determining that *Michigan Citizens* is overruled, should take this opportunity to describe the scope of standing under MEPA in order to guide lower courts and litigants in future MEPA actions. Although the Legislature granted universal standing in MEPA, this Court should explain several aspects of MEPA's universal standing to eliminate issues that typically arise in standing controversies. In particular, a

MEPA plaintiff does not have to demonstrate harm different from "citizenry at large," MEPA protects the environment and not just plaintiffs, and MEPA applies to private property as well as public resources.

1. A MEPA plaintiff's harm does not have to be "different from the citizenry at large."

One of the implications of universal standing is that a MEPA plaintiff does not have to show that the plaintiff has been harmed differently than the general public in order to have standing. This prudential barrier to citizen standing does not apply in MEPA cases.

This Court regularly holds in cases involving public rights that a party establishes standing only by demonstrating that the party has a "substantial interest [that] will be detrimentally affected in a manner differently from the citizenry at large." *House Speaker v Governor*, 443 Mich 560, 572; 506 NW2d 190 (1993). This rule is derived from this Court's consistently-imposed requirement that applicants for mandamus show actual injury or a specific statutory right to seek mandamus against a public officer.[4] As shown in Section I.B (pages 4-5), the Legislature conferred standing on "any person"

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[4] *House Speaker v Governor* cites *House Speaker v State Administrative Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993) (legislator had standing to contest denial of specific statutory right), which cites *Alexander v City of Norton Shores*, 106 Mich App 287; 307 NW2d 476 (1981) (city residents lacked standing to contest municipal approval of economic development project plan), which cites *Waterford School Dist v State Bd of Ed*, 98 Mich App 658, 662; 296 NW2d 328 (1980) (school district deprived of state funds in violation of Headlee Amendment), which cites *Inglis v Public School Employees Retirement Bd,* 374 Mich 10; 131 NW2d 54 (1964) (mandamus denied, plaintiff not adversely affected), which cites *Wilson v Cleveland*, 157 Mich 510; 122 NW 284 (1909) (mandamus denied, no statute vests plaintiff with specific right), which cites *People v Whipple*, 41 Mich 548; 49 NW 922 (1879) (mandamus denied, no specific right involved, but only general violation of public duty).

without adding words to MEPA such as "harmed", "aggrieved" or "detrimentally affected." Standing under MEPA requires no demonstration of harm to the plaintiff. Because MEPA plaintiffs require no injury to have standing, and because the Legislature conferred a right to protect the environment on "any person," a MEPA plaintiff is not required to show that he or she has a "substantial interest" that is "detrimentally affected in a manner different from the citizenry at large."

The air, water and other natural resources in Michigan are shared resources: every citizen has a stake in protecting them, both individually and as a member of the public. Yet traditional standing tests would deny citizens, who share a public concern about protecting the environment, standing to protect these diffuse resources. One of the purposes of MEPA is to grant standing to citizens to protect resources — in which we all have an interest — from harm caused by conduct or activity of a few, such as authorizing the emission of emitting pollutants into the air, authorizing the discharge of or discharging pollutants into the water, authorizing the disposal of or disposing of pollutants on land, or authorizing the impairment or destruction of or impairing or destroying the state's resources held in trust for citizens.

2. MEPA protects the environment, not just plaintiffs.

In enacting MEPA, the Legislature directly protected the "air, water and other natural resources and the public trust in these resources." MCL 324.1701(1). In authorizing relief to be granted in court actions under MEPA, the Legislature authorized courts to protect the environment:

> The court may grant temporary and permanent equitable relief or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust in these resources from pollution, impairment or destruction.

MCL 324.1704(1). In administrative proceedings, the Legislature prohibited administrative agencies from authorizing conduct that pollutes, impairs or destroys these resources:

> In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

MCL 324.1705(2). Notably absent from MEPA is any requirement that plaintiffs themselves be harmed: MEPA's focus is on the environment, not plaintiffs.

MEPA contrasts with the federal test for standing set forth in *Lee, Cleveland Cliffs,* and *Michigan Citizens*. The federal test requires an injury in fact to a person. *Michigan Citizens*, 479 Mich at 294-295. Indeed, the federal test oddly dispenses with injury to the environment in order for an environmental plaintiff to have standing:

> The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff.

Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc, 528 US 167, 181; 120 S Ct 693; 145 L Ed 2d 610 (2000). See *Michigan Citizens*, 479 Mich at 280. In

contrast, the focus of MEPA is preventing or minimizing harm to the environment, not injuries to plaintiffs.[5]

For standing under MEPA, a plaintiff must allege harm to the environment. Allegations of generalized harm, however, without specific factual averments of environmental harm — likely "pollution, impairment, or destruction" — fail to state a claim under MEPA. *Dafter Sanitary Landfill v Superior Sanitation Service, Inc*, 198 Mich App 499, 504; 499 NW2d 383 (1993). But once a MEPA plaintiff satisfies the obvious threshold of pleading environmental harm, the Legislature prudently structured MEPA to dispense with adjunct controversies about standing, and to force parties and trial courts to move directly to the environmental merits of the case.

3. MEPA applies to private property as well as public resources.

In enacting MEPA, the Legislature did not limit MEPA's scope to publicly-owned or publicly-accessible resources or to property interests held by the plaintiff. MEPA applies to the "air, water, or other natural resources and the public trust in these resources." MCL 324.1701(1). The standing test — now overruled — in *Michigan Citizens*, however, requires use of a resource or access to it for standing. 479 Mich at 297 ("the record below does not indicate that plaintiffs used or had access to these areas or

[5] To be sure, injuries to persons in the form of adverse health impairment from environmental harm is probably a sufficient, but not a necessary, condition for a court to grant relief pursuant to MEPA. See, e.g., *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668, 695-696; 263 NW2d 778 (1977) (affirming trial court finding that plaintiff proved prima facie MEPA case from, inter alia, citizen witnesses complaining of "serious physical symptoms" from odor pollution).

that they enjoyed a recreational, aesthetic, or economic interest in them"). The implication of this ruling is that unless a MEPA plaintiff claims harm to a public resource to which the plaintiff has access, the plaintiff lacks standing. That implication does not survive comparison with the plain text of MEPA, in which the Legislature defined the scope of MEPA to include all natural resources in the state, without a distinction between public or private.

A further implication in *Michigan Citizens* is that, other than plaintiffs who allege harm to public property, only plaintiffs who hold a property interest may bring a MEPA action. 479 Mich at 297 ("Plaintiffs enjoy the full protection MEPA affords to vindicate their riparian property interests."). This implication does not survive comparison with the plain language of the statute and should be rejected by this Court as inconsistent with MEPA's broad scope applicable to private as well as public resources.

Several MEPA cases that have been fully tried or have reached this Court or the Court of Appeals demonstrate that MEPA applies fully to private property owned by a defendant. In *Nemeth*, 457 Mich at 19, this Court applied MEPA to a "multimillion-dollar marina, condominium, and hotel project" on "property owned by defendant." In *Irish v Green*, 2 ELR 20505; 4 ERC 1402 (Emmet Cty Cir Ct, July 15, 1972), attached to *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 314-323; 224 NW2d 883 (1975), the court found that subdivision development on private land would likely pollute groundwater, destroy trees and erode soil and imposed conditions on the developer to mitigate these harms. In *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich App 495; 320 NW2d 668 (1982), plaintiff challenged residential development on neighboring

private land that would destroy wildlife habitat. There was no question either by the parties or the courts in these cases that MEPA applied to private property.

E. MEPA is designed to eliminate standing barriers.

The Legislature drafted MEPA to eliminate standing issues in actions that seek to protect the environment common to all citizens. The Legislature, by enacting MEPA, complied with the Michigan Constitution's command:

> The legislature shall provide for the protection of the air, water and other natural resources from pollution, impairment and destruction.

Const 1963, art 4, § 52. *State Hwy Comm'n v Vanderkloot*, 392 Mich 159, 179, 182; 220 NW2d 416 (1974).

The public policy of this state is comprised of the constitution, statutes and common law. *Terrien v Swit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002). MEPA, as the Legislature's fulfillment of the constitution's command to protect the environment, demonstrates the public policy of this state that citizens be given a substantial share of protecting the state's air, water and other natural resources. This Court should confirm that public policy through MEPA's universal standing.

II. A plaintiff states a claim under MEPA by challenging a permit issued by an administrative agency.

This court erred in *Preserve the Dunes*. That error takes two principal forms: (1) MEPA applies to all agencies, and judicial review under MEPA of agency action is therefore not limited to the Administrative Procedures Act (APA), MCL 24.201 *et seq*, or

the Revised Judicature Act (RJA), MCL 600.631; and (2) MEPA focuses not only on actual conduct, but also focuses on proposed conduct.

A. Standard of review.

Whether MEPA applies to permits issued by administrative agencies presents an issue of statutory interpretation that this Court reviews de novo. *Preserve the Dunes*, 471 Mich at 513, citing *Oade v Jackson Nat'l Life Ins Co,* 465 Mich 244, 250; 632 NW2d 126 (2001). In *Potter v McLeary,* 484 Mich 397, 410-411; 774 NW2d 1 (2009), this Court more fully explained the method of statutory interpretation:

> Assuming that the Legislature has acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature.[12] In determining the intent of the Legislature, this Court must first look to the language of the statute.[13] The Court must, first and foremost, interpret the language of a statute in a manner that is consistent with the intent of the Legislature.[14] "'As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.'"[15] Moreover, when considering the correct interpretation, the statute must be read as a whole.[16] Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[17] In defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme.[18] A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained.[19] Finally, the statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme.[20]

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[16]*Sun Valley*, *supra* at 237.
[17]*Herman, supra* at 366.
[18]*Id.*, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501, 133 L Ed 2d 472 (1995).
[19]*Wayne Co v Auditor General*, 250 Mich 227, 223; 229 NW 911 (1930).
[20]*Wayne Co, supra* at 234.

B. MEPA applies to all administrative agency actions.

Preserve the Dunes incorrectly construed MEPA, primarily by mischaracterizing the relationship of MEPA to administrative action and overlooking § MCL 324.1705(2). When properly analyzed, the language, structure and purpose of MEPA demonstrate that MEPA applies to all administrative actions, including issuing permits or, as in this case, a certificate of coverage pursuant to Part 31 of NREPA, MCL 324.3101 *et seq.*

1. Preserve the Dunes mischaracterized MEPA's relationship to administrative action.

Preserve the Dunes fundamentally misunderstood the relationship of MEPA to administrative action. This Court mischaracterized the plaintiff's claim in *Preserve the Dunes* as a "collateral challenge." *Preserve the Dunes*, 471 Mich at 511. In an off-quoted section encapsulating this misunderstanding, this Court said:

> An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA.

Preserve the Dunes, 471 Mich at 519. This Court then described the general nature of judicial review of administrative action in Michigan:

> In general, judicial review of an administrative decision is available under the following statutory schemes: (1) the review process prescribed in the statute applicable to the particular agency, (2) an appeal to circuit court pursuant to the Revised Judicature Act (RJA), MCL 600.631, and the Michigan Court Rules 7.104(A), 7.101 and 7.103, or (3) the review provided in the Administrative Procedures Act (APA), MCL 24.201 *et seq. Palo Group Foster Care, Inc v Dep't of Social Services,* 228 Mich App 140, 145; 577 NW2d 200 (1998).

Id.[6] This Court then held that plaintiff's challenge in *Preserve the Dunes* was time-barred under either the APA 60-day time limit, MCL 24.304(1), or the 21-day appeal period in MCR 7.101(B)(1), which applies to appeals brought under RJA 631, MCL 600.631.

The opinion in *Preserve the Dunes* contradicted itself with respect to the APA. *Preserve the Dunes* properly noted that the Sand Dune Mining Act (SDMA), Part 637 of NREPA, MCL 324.63701 *et seq.*, does not contain a provision allowing for appeal through a contested case under the APA. Because there was no right to such an appeal, the discussion in *Preserve the Dunes* of an appeal under the APA is nonsensical.

As to RJA 631, *Preserve the Dunes* did not quote or analyze the language in the statute, which says:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal *or*

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[6] This three-part description of judicial review of administrative action first appeared in *Nestell v Bd of Ed of the Bridgeport-Spaulding Community Schools*, 138 Mich App 401, 404; 360 NW2d 200 (1984). The Court of Appeals in *Nestell* does not indicate the source of its rule by a canvas of statutes, prior holdings of this Court, or other authority. Assuming this test to be the correct test, MEPA is "applicable to the particular agency" as demonstrated in section II.B.2 below at page 16 and following.

> *other judicial review has not otherwise been provided for by law*, to the circuit court of the county in which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.

RJA 631, MCL 600.631 (emphasis added). *Preserve the Dunes* did not discuss whether there was in that case "other judicial review" that had "otherwise been provided for by law." *Preserve the Dunes* merely assumed that the appeal from an SDMA decision by DEQ would be pursuant to RJA 631. Because an appeal made RJA 631 is expressly subject to judicial review provided by other statutes, *Preserve the Dunes* should have discussed whether other statues provided for judicial review of the SDMA decision by DEQ. In that discussion, *Preserve the Dunes* should have noted that MEPA provides such judicial review in § 1705(2) for issues relating to pollution, impairment or destruction of the air, water or other natural resources.

2. Through § 1705(2), MEPA grants judicial review of all agency action.

Preserve the Dunes erred in overlooking § 1705(2) of MEPA, which says:

> In administrative, licensing, or other proceedings, and in *any judicial review* of such a proceeding, the *alleged* pollution, impairment, or destruction of the air, water or other natural resources, or the public trust in these resources, *shall be determined, and conduct shall not be authorized or approved* that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

MCL 324.1705(2) (emphasis added).[7] *Preserve the Dunes* did not cite, mention or analyze § 1705(2). Yet the plain language of the statute shows how § 1705(2) should have controlled the outcome in *Preserve the Dunes*.

Section 1705(2) requires agencies and courts to do four things: (1) agencies in "administrative, licensing or other proceedings" shall determine the existence (in other words, make a finding) of any "alleged" pollution, impairment or destruction; (2) agencies in "administrative, licensing or other proceedings" shall not authorize or approve conduct that pollutes, impairs or destroys or "is likely to have such an effect" if there is a feasible and prudent alternative; (3) a court on judicial review of the agency action shall determine the existence of any "alleged" pollution, impairment or destruction; and (4) a court on judicial review of the agency action shall not authorize or approve conduct that pollutes, impairs or destroys or "is likely to have such an effect" if there is a feasible and prudent alternative.

The plain language of § 1705(2) makes it applicable to all agencies. Although this court has not construed § 1705(2),[8] the language of this section plainly imposes a substantive duty on agencies (1) to make findings during agency consideration of an application by any person concerning alleged pollution, impairment or destruction, and

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[7] An alternative may be feasible even though a particular defendant may not be able to afford it or may be forced to go out of business. *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668, 703-704. An alternative is "'prudent' unless adopting it would involve 'truly unusual factors' or costs reaching 'extraordinary magnitudes'." *Id.* at 705, quoting *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 411; 91 S Ct 814; 28 L Ed 2d 136 (1971).

[8] Justice Corrigan, joined by Justices Young and Markman, however, recognized that § 1705(2) "allows a court to review an administrative action for a MEPA violation." *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 483 Mich 887, 888; 760 NW2d 230 (2009) (Corrigan, J. dissenting).

(2) to not authorize or approve conduct by an applicant that would result in pollution, impairment or destruction of the environment if a feasible or prudent alternative exists.[9] Such authorization or approval would include administrative actions such as determining eligibility for a sand dune mining permit under the SDMA (Part 637 of NREPA), issuing permits, granting licenses, or issuing certificates of coverage under Part 31 of NREPA.[10]

Section 1705(2) imposes the same duty on courts during judicial review of the agency action. Courts must determine whether there will be environmental harm and must not approve such harm unless the applicant proves there is no feasible and prudent alternative. Such judicial review of agency action is de novo and not on the record. *West Michigan Environmental Action Council v Natural Resources Comm'n*, 405 Mich 741, 754; 275 NW2d 538 (1979) *(WMEAC)*.[11] And courts are not bound by any administrative finding. *Her Majesty the Queen v City of Detroit,* 874 F2d 332, 341 (CA 6, 1989).

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[9] This substantive duty was described by MEPA's author, Professor Joseph L. Sax, in 1972:

> [I]t is clear that the legislature intended that plaintiffs be able to enjoin the granting of permits by government agencies when the use of those permits will create pollution. Moreover, section 5(2) of the Act imposes substantive duties on regulatory agencies that confirm this point. This section of the Act states that in any "administrative, licensing or other proceedings . . . no conduct shall be authorized or approved which does, or is likely to . . . " pollute.

Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1003, 1073 (1972).

[10] One of the methods by which agencies can fulfill their duty under § 1705(2) is to require applicants whose conduct may pollute, impair or destroy the environment to describe feasible and prudent alternatives that the applicant explored to avoid probable environmental harm.

[11] This Court in *WMEAC*, 405 Mich at 753-754, cited § 1705(2) for the proposition that:

> The environmental protection act would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands.

Two interpretive questions arise when construing § 1705(2): (1) does MEPA constitute "any judicial review" of such proceedings, and (2) what is the meaning of "alleged" pollution, impairment, or destruction?

As to the first question, viewing MEPA as a whole and considering the placement of the language and the purpose of the statute, MEPA provides for judicial review of any agency proceeding. MEPA authorizes an action by any person against any other person — including an administrative agency — for the protection of the air, water, and other natural resources to redress an "alleged violation" of the statute. MCL 324.1701(1). Section 1701(1) therefore authorizes judicial review of agency action that allegedly violates the statute. A violation of the statute by an agency might take the form of conduct undertaken by the agency. See e.g., *Eyde v Michigan*, 393 Mich 453; 225 NW2d (construction of sewer) and *Ray* (reconstruction of a drain). But a violation of the statute can also take the form of a violation of § 1705(2), if the agency failed to make findings of environmental harm or probable environmental harm, or authorized or approved conduct that would pollute, impair or destroy without determining if feasible and prudent alternatives exist.

As to the second interpretive question, the term "alleged" in § 1705(2) is undefined, but can be understood by reference to common dictionary definitions. Black's Law Dictionary (8th ed) defines "alleged" as: "1. Asserted to be true as described <alleged offenses>. 2. Accused, but not yet tried <alleged murderer>." Webster's New Universal Unabridged Dictionary (1996), defines "alleged" as "1. declared or stated to be

as described; asserted . . . 2. doubtful; suspect, supposed. . . ." The dictionary definitions demonstrate that "alleged" does not refer necessarily to an allegation in a pleading.

In the administrative context, the "alleged" pollution, impairment or destruction would include allegations by a person in the form of a letter, technical report or other submission to the agency that the agency will authorize conduct that will pollute.[12] In judicial review, the "alleged" pollution, impairment or destruction could arise through an allegation in a pleading filed as part of a court's de novo review of administrative action pursuant to § 1705(2). See, e.g., MCR 2.111(A).

The "alleged" pollution, impairment or destruction could also arise in the context of an action adjudicated under MCL 324.1703(1):

> When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources, the defendant may rebut the prima facie showing by the submission of evidence to the contrary.

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[12] This construction of "alleged" in § 1705(2) clarifies a confusing portion of *Preserve the Dunes*. This Court observed that a person wishing to "intervene" in agency proceedings under the SDMA had two avenues: either subscribe to a list of pending sand dune mining applications pursuant to MCL 324.63708(5) or intervene through § 1705(1) of MEPA, MCL 324.1705(1). 471 Mich at 520-521. As to the first avenue, this Court observed that the interested person could "learn of and participate in agency decisions." *Id.* This Court did not describe the process by which the interested person could "participate." The SDMA does not describe that process. MEPA provides the answer: by filing a letter, technical report or other submission to the agency "alleging" pollution, impairment or destruction, the interested person would thereby put the agency on notice that it must fulfill its duty under § 1705(2) to "determine" whether its permit or other proposed action would authorize or approve conduct that would have the effect of pollution, impairment or destruction.

This Court has held that the Legislature intended § 1703(1) to apply to administrative agency actions such as permits.[13] Before the decision in *Preserve the Dunes*, this Court unambiguously held that administrative permits are subject to a MEPA action brought pursuant to § 1703(1). *WMEAC,* 405 Mich at 750-751. In addition, the Court of Appeals has held that MEPA applies to issuance of local government permits. *Comm for Sensible Land Use v Garfield Twp*, 124 Mich App 559, 564-656; 335 NW2d 216 (1983). The Court of Appeals has also sensibly ruled that MEPA applies to administrative action, such as a permit, that is "the last hurdle in moving from paperwork to the outdoors." *Wortelboer v Benzie Cty*, 212 Mich App 208, 221; 537 NW2d 603 (1995).

3. As supplementary to existing law, MEPA provides judicial review in addition to other types of judicial review.

Preserve the Dunes erred in overlooking MCL 324.1706, which says:

> This part is supplementary to existing administrative and regulatory procedures provided by law.

The Legislature plainly intended MEPA to provide remedies in addition to those in existing law and administrative rules, including judicial review under the APA and RJA 631. *Preserve the Dunes* therefore incorrectly shoehorned the plaintiff in that case into

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[13] Professor Sax describes § 1703(1) as follows:

> [T]he Act rather inartfully refers in section 3(1) to "conduct of the defendant" that "is likely to pollute." While the granting of a permit does not comfortably fit within this language as conduct that itself is likely to pollute, it is clear that the legislature intended that plaintiffs be able to enjoin the granting of permits by government agencies when the use of those permits will create pollution.

Sax & Conner, 70 Mich L Rev at 1073 (footnote omitted).

the choice of review solely pursuant to either the APA or RJA 631. See *Preserve the Dunes*, 471 Mich at 527 (Kelly, J. dissenting).

The Legislature's intent in enacting MEPA as supplementary to existing law was two-fold. First, the Legislature wanted to assure that administrative agencies took seriously the Legislature's command that agencies not authorize or approve conduct that would pollute, impair or destroy the environment by reliance on status quo procedures in existing law. As MEPA's author, Professor Joseph Sax, said:

> The principal purposes of the EPA were to remove free-wheeling administrative discretion and to assure that regulatory agency decisions were environmentally defensible on their merits.

Sax & Conner, 70 Mich L Rev at 1061 (footnote omitted).

Second, the Legislature wanted to empower the courts to review those administrative decisions on the merits through de novo review.[14] This legislative policy of supplemental, de novo judicial review[15] does not implicate separation of powers concerns. *Cleveland Cliffs*, 471 Mich at 688, 689 (Kelly, J. concurring). There is no separation of powers concern because courts are not exercising the executive power, but only exercising power delegated by the Legislature to review the executive's exercise of its power.

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[14] As described by a law review article contemporaneous with MEPA's enactment, MEPA was designed to reduce judicial deference to administrative decisions:

> . . . the judiciary's unwarranted confidence in the determinations of administrative regulatory agencies which too often tended to identify with the interests of those groups ostensibly being regulated. . . .

Note, *Michigan Environmental Protection Act: I. Political Background*, 4 U Mich J L Reform 358, 360 (1970).

[15] MEPA requires de novo review even if judicial review is pursuant to the APA or RJA 613.

4. MEPA does not extend administrative agency proceedings indefinitely.

Contrary to the concerns in *Preserve the Dunes,* judicial review of agency action cannot occur indefinitely. *Preserve the Dunes* expressed these concerns as follows:

> Countless entities apply for and receive permits for conduct that affects Michigan's natural resources. Under the dissent's regime, the permitting decision can never be final. Were we to adopt the dissent's extreme understanding of MEPA, every permit that has ever been issued would be subject to challenge; any undotted "i" or uncrossed "t" could potentially invalidate an existing permit. We do not believe the Legislature intended MEPA to destabilize the state's permitting system in this manner.

Preserve the Dunes, 471 Mich at 522. Putting aside the unusual notion that MEPA authorizes challenges to typographical errors in permits, MEPA does not "destabilize the state's permitting system"; MEPA requires only that agencies defend their permits on their environmental merits. The agencies' defense merely complies with the constitution's command to the Legislature to provide for the protection of the air, water and other natural resources from pollution, impairment or destruction.

There are two prosaic reasons to doubt the policy concerns expressed in *Preserve the Dunes*. First, because MEPA provides for equitable and declaratory relief and does not contain a limitations period, MEPA actions are governed by the six-year statute of limitations in MCL 600.5813.[16] *Attorney General v Harkins,* 257 Mich App 564, 570-571; 669 NW2d 296 (2003). See also *DiPonio Constr Co v Rosati Masonry Co, Inc*, 246 Mich App 43, 56; 641 NW2d 59 (2001) (civil cause of action arising from a statutory

[16] "All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." MCL 600.5813.

violation is subject to six-year limitation in MCL 600.5813). See *Preserve the Dunes*, 471 Mich at 538 (Kelly, J. dissenting). Under the rule in *Harkins*, a plaintiff must file an action under MEPA within six years after the alleged improper agency action or pollution, impairment or destruction occurs. Businesses that engage in permitted conduct that may affect the environment — whose conduct and whose permits are subject to the six-year statute of limitations in MCL 600.5813 — probably engage in commercial contracts that are subject to the six-year statute of limitations in MCL 600.5807(a) for breach of contract. Yet one would be hard-pressed to argue that the six-year statute of limitations for breach of contract has "destabilized" Michigan's business community.

Second, equitable and declaratory actions under MEPA are subject to laches. Laches constitutes delay that prejudices an opponent. *Dunn v Minnema*, 323 Mich 687, 696; 36 NW2d 182 (1949) (collecting cases); *Attorney General v Powerpick Player's Club of Michigan, LLC,* 287 Mich App 13, 51; 783 NW2d 515 (2010). Although it appears that no appellate court has defined what constitutes prejudicial delay in a MEPA case,[17] MCL 600.5815[18] requires laches to be applied in equitable actions. Laches is a common defense, well-known to all practitioners and courts. The defense of laches provides a back-stop to negate the notion that MEPA imposes a "radical requirement that

[17] In *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 65-66; 380 NW2d 53 (1985), the court rejected a defense of laches based on defendant's unclean hands in denying access to test contaminated groundwater.

[18] "The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought. The equitable doctrine of laches shall also apply in actions where equitable relief is sought." MCL 600.5815.

courts indefinitely police administrative agencies' permit procedures and decisions." *Preserve the Dunes*, 471 Mich at 523.

C. MEPA applies to administrative permits that authorize probable pollution, impairment or destruction of the air, water and other natural resources.

Preserve the Dunes erred in holding that "the focus of MEPA is on defendant's conduct", 471 Mich at 514, that "the focus of MEPA is on the defendant's actual conduct", *id.* at 517, and that "MEPA is concerned only with harmful conduct", *id.* at 518. *Preserve the Dunes* overlooked or ignored language in MEPA that allows a plaintiff to challenge an "alleged violation" that "is likely to occur" and overlooked or ignored a long line of MEPA cases that confirm that MEPA concerns future conduct pursuant to presently-issued permits. At best, MEPA's focus is only in part on conduct.

There is ample precedent that MEPA applies to administrative permits or actions as conduct that may harm the environment. *Ray v Mason County Drain Comm'r*, 393 Mich at 309, held that a plaintiff's prima facie case under MEPA is "not restricted to actual environmental degradation but also encompasses probable damage to the environment as well." The holding in *Ray* was affirmed in *Nemeth v Abonmarche Dev, Inc,* 457 Mich 16, 25; 576 NW2d 641 (1998). This Court squarely answered, in the affirmative, the question of whether administrative permits were "conduct alleged to be likely to pollute, impair or destroy" natural resources in *WMEAC*, 405 Mich at 751. See *Preserve the Dunes*, 471 Mich at 574-575 (Kelly, J. dissenting).

Preserve the Dunes overlooked that a MEPA violation can exist without actual pollution, impairment or destruction having occurred. If MEPA were construed otherwise, it would be nothing but a codification of the common law of nuisance, which presupposes past or present harm for a claim to be heard.[19] Although MEPA, like all environmental statutes, traces its roots to the common law, MEPA supplants nuisance law to the extent of a conflict. *Wayne County Dep't of Health v Olsonite Corp*, 79 Mich App 668, 693-694; 263 NW2d 778 (1977).

The concept of MEPA being used to challenge administrative permits is at bottom an issue of proximate cause. Lacking administrative authorization, the permitee's conduct would be unlawful under the permit-granting statute, whether the SDMA in *Preserve the Dunes* or Part 31 of NREPA in this case. The permit therefore is not only a cause in fact of the permittee's likely harmful conduct, the permit is also a proximate cause of that conduct.[20] As noted in *WMEAC*, MEPA can be violated when the effects of permit issuance harm the environment. *WMEAC*, 405 Mich at 751, 760.

As a matter of practice, the administrative permit that authorizes harmful conduct is the central part of a MEPA claim against the permit holder. Let us assume that an agency issues a permit that would authorize the permit holder to emit pollutants into the air, discharge pollutants into the water, dispose of pollutants on land, or engage in other

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[19] Claims under MEPA to restrain future environmental harm do not have to meet the stringent burden of proof to enjoin an anticipatory nuisance by "practically certain" evidence. *City of Jackson v Thompson-McCully Co, LLC,* 239 Mich App 482, 490; 608 NW2d 531 (2000).

[20] The argument of appellee Department of Natural Resources and Environment that bank loans, consultant reports or equipment leasing are proximate causes equal to permits, brief p 18, is unpersuasive, because none of these actions is legally proximate to the permitee's conduct in the manner of a permit.

conduct that would impair or destroy natural resources. Let us further assume, pursuant to *Preserve the Dunes*, a MEPA plaintiff sues only the permit holder to enjoin likely pollution, impairment or destruction arising from the permit holder's conduct authorized by the permit. Let us further assume that, for whatever reason, defendant has not acted pursuant to authority granted in the permit; the harm, if it occurs, will occur in the future. At trial, exhibit A for the plaintiff will be none other than the permit. Expert testimony will concentrate on what?: the likely pollution, impairment or destruction if the defendant engages in the conduct authorized by the permit. The trial judge will make findings of fact as to whether such conduct authorized by the permit will likely pollute, impair or destroy. And the trial judge may determine if the pollution standards "fixed" in the permit are valid, applicable and reasonable, and, if they are deficient, direct the adoption of appropriate standards.[21] For all appearances, therefore, the trial will have been about the permit. So as a practical matter, MEPA has been and should continue to be able to be used to challenge administrative permits.

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[21] Section 1701(2) of MEPA says:

> In granting relief provided by subsection (1), if there is a standard of pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency or political subdivision of the state, the court may:
>
> (a) Determine the validity, applicability and reasonableness of the standard.
>
> (b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

D. The focus of MEPA.

Preserve the Dunes failed to acknowledge the overall purpose of MEPA. In enacting MEPA, the Legislature focused on five substantive areas:

1. The Legislature authorized citizens to protect the environment without standing barriers. MCL 324.1701(1).

2. The Legislature authorized courts to independently scrutinize pollution standards. MCL 324.1701(2).

3. The Legislature prohibited persons from polluting, impairing or destroying the air, water or other natural resources if there are feasible and prudent alternatives to that conduct. MCL 324.1703(1).

4. The Legislature authorized courts to grant equitable relief and impose conditions on defendants to protect the environment. MCL 324.1704(1).[22]

5. The Legislature prohibited agencies from authorizing conduct that pollutes, impairs or destroys the environment if there are feasible and prudent alternatives. MCL 324.1705(2).

MEPA is positive law that uniquely anticipates common law development. *Ray*, 393 Mich at 306. The Legislature enacted MEPA to authorize courts — in the common law tradition of case-by-case adjudication — to prevent pollution, impairment or destruction from occurring, not merely to redress past harm. As a remedial statute,

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[22] In fashioning this relief, judges do so without balancing costs to a defendant. *Nemeth*, 457 Mich at 21-22 & n3. Appellee Merit Energy's argument (brief p 16) that MEPA involves such balancing is therefore contrary to *Nemeth*. In addition, Merit Energy provides no support for its position; its argument should therefore be disregarded. *Goolsby v City of Detroit*, 417 Mich 651, 655 n1; 358 NW2d 886 (1984).

MEPA should be liberally construed to effectuate its purpose. *People v Jones*, 24 Mich 215, 222 (1872); *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d 488 (1988).

The primary way that the Legislature's purpose can be implemented is to allow MEPA plaintiffs to challenge permits directly. When so much of private conduct that affects the environment is governed by administrative permits, MEPA assures that those permits do not authorize pollution, impairment or destruction of the air, water or other natural resources of the state of Michigan.

Conclusion and Relief Sought

Amicus curiae Michigan Environmental Council respectfully requests that this Court overrule *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479 Mich 280; 737 NW2d 447 (2007), and *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004), and hold that the Michigan Environmental Protection Act, MCL 324.1701 *et seq.*, grants universal standing to sue and allows persons to directly challenge administrative agency actions.

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Dated: September 27, 2010